

RICHARD L. BUNGARD)	
Claimant)	
)	
VS.)	
)	
SAM'S WHOLESALE CLUB)	
Respondent)	Docket No. 1,029,481
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

¹ At the September 6, 2006, preliminary hearing, the ALJ announced that claimant “is requesting . . . temporary total to July 19, 2006.” P.H. Trans. at 4.

Claimant argues that the Order of the ALJ should be affirmed, but if the Board should find that claimant did not give notice within 10 days, then there is just cause for extending the time to 75 days.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant began working for respondent in October 2003 in the overnight receiving department. His job duties involved unloading freight from semis, consolidating pallets, verifying manifest, and placing the pallet product in the main storage cell. He testified he spent 85 to 90 percent of his time on a stand-up forklift.

Claimant testified that when a loaded semi tractor trailer backed up to the unloading dock, he would lift the metal dock plate, which then dropped into the trailer. He would then back the forklift into the trailer over this dock plate. He stated the dock plate had a hinge on it which shifted down into the trailer to line up with the bed of the trailer, and that the forklift would drop down anywhere from five to six inches into the trailer. When coming back out of the truck, the forklift would bounce back up onto the dock plate to get back into the receiving area. He would have to go over the dock plate from 40 to 50 times to unload the trailer. Once the freight was removed off the truck, he would look up about 20 to 25 feet to put the product onto the steel racks. At the same time, he would be looking back behind his shoulder.

Claimant said that he gradually began having problems in his neck, upper back, and shoulder. The more he worked, the worse it became. He said he made arrangements with two coworkers so they would primarily unload the truck and he would run the freight out to the floor because driving over the dock plates aggravated his neck and back. He also said that he told his supervisors, Jerry McDaniel and Cynthia Hinnant, that he was no longer unloading the trucks. He testified that both Mr. McDaniel and Ms. Hinnant knew he was taking it easier unloading the trucks because driving over the dock plates was hurting his neck.

By June or July 2005, claimant was in pain all of the time. In September 2005, he went to see Dr. Hornbaker. He continued to work until March 27, 2006, when he was terminated for reasons unrelated to his injuries. During that period of time, his neck problems got worse, and he received a couple of epidural injections. He did not take time off work to see the doctor, except when he had the epidural injections. He did not have off-work slips from the doctor but verbally told Mr. McDaniel that he receiving injections because of the pain in his neck and back.

Claimant said that he told Mr. McDaniel, Eva Gentry, and Ms. Hinnant off and on that his back was hurting and that he was seeing a doctor for his problems. He said he had discussions with Mr. McDaniel that riding over the dock plates was aggravating his back problems. He was not asked to fill out an incident report, and it was his understanding that he could not fill out an incident report for a series of accidents that happened over time.

Mr. McDaniel testified that he did not recall claimant ever telling him that he had suffered a work injury to his neck or back. He admitted that claimant told him he was going to have an epidural injection for his neck or shoulder, but said that claimant did not tell him it was work-related. He does not recall being told that claimant was not driving over the dock plates because of a work injury. However, he stated that in a casual conversation, claimant told him he thought driving over the dock plates was causing him problems with his neck. When Mr. McDaniel was asked what the penalty would be if his supervisors found out that he had failed to report a workers compensation claim, he answered that he would probably be terminated.

Ms. Hinnant was claimant's immediate supervisor from October 2, 2005, until his last day of work in March 2006. She testified that she does not recall claimant ever telling her that he had a work injury. She also said he never told her that driving over the dock plate made his neck and back hurt, but acknowledged that driving a forklift over the dock plate into a trailer was jarring. She also acknowledged that employee bonuses were adversely affected by work-related injuries. So if claimant had a claim for a work-related injury, her bonus, as well as those of the other employees, would be reduced. And, although respondent's counsel advised the ALJ both at the outset and the conclusion of the preliminary hearing that respondent had no notice that claimant was alleging his back and neck injuries were work related until respondent received the May 12, 2006, letter from claimant, Ms. Hinnant prepared a statement on May 3, 2006, that begins: "In regards to Richard Bungard's claim, he never reported to me a back injury."² Ms. Hinnant said she completed that statement "after the store found out that a claim was going to be made by Mr. Bungard."³

Eva Gentry works in the human resources department at respondent. She testified that she first heard claimant was making a workers compensation claim after receipt of the letter dated May 12, 2006. However, she also acknowledged writing a statement on May 4, 2006, to the effect that claimant "never mentioned anything about a back injury due to work."⁴ She stated that claimant never told her that he was having neck and back problems at work. Claimant had come to her twice to fill out paperwork for leaves of

² P.H. Trans., Resp. Ex. A, P.H. Trans. at 40.

³ P.H. Trans. at 40.

⁴ P.H. Trans., Resp. Ex. B.

absence, once for an emergency appendectomy and another time for problems with his arms. In neither of those conversations did claimant mention anything about neck or back problems. She also said that her failing to report a workers compensation injury could result in a reprimand or termination.

Claimant saw Dr. Stanley Hornbaker for his neck and back problems. Dr. Hornbaker's medical note of September 19, 2005, states: "He notes a dull throb behind the right scapula and if he turns his head right far enough a very sharp pain from the right side of the neck into the scapula. This is beginning to bother him a lot at work because he drives a forklift."⁵

Dr. Sergio Delgado examined claimant on July 19, 2006, at the request of claimant's attorney for the purpose of giving an opinion of causation of claimant's neck and back complaints. After examining claimant, Dr. Delgado opined: "His symptoms in the cervical region and upper thoracic area appear to be related to a work related injury as described and compatible with the mechanisms of injury which he describes."⁶

The ALJ found that "[t]he [r]espondent had actual notice within 10 days" of the accident.⁷ The ALJ did not make a specific finding of the date of accident. In his May 12, 2006, letter to respondent, claimant claimed he suffered personal injuries by accidents "occurring over a period of time diagnosed on 30th September 2005 until and continuing through my termination on April 18th 2006."⁸ Claimant's Application for Hearing alleges the dates of accident as a series "[b]eginning Oct. 2004 and continuing through and past April 2006."⁹ Likewise, claimant's Application for Preliminary Hearing alleges a series of accidents "[b]etween Oct. 2004 and continuing through April 2006."¹⁰ However, the Amended Application for Hearing filed on June 27, 2006, merely gives the date of accident as a "series through 3/27/06."¹¹ A series of accidents "to March 27, 2006" is what the ALJ announced as the alleged accident dates at the preliminary hearing.¹² Also at the preliminary hearing, respondent admitted receiving notice of the alleged accidents on May

⁵ P.H. Trans. (Sept. 6, 2006), Cl. Ex. 1 at 14.

⁶ *Id.* at 5.

⁷ ALJ Order (Sept. 13, 2006) at 1.

⁸ Claimant's letter to respondent filed with Division June 14, 2006.

⁹ Form K-WC E-1 filed June 14, 2006.

¹⁰ Form K-WC E-3 filed June 14, 2006.

¹¹ Form K-WC E-1 filed June 27, 2006.

¹² P.H. Trans. at 4.

12, 2006.¹³ In its brief to the Board, respondent likewise argues that the accident date should be March 27, 2006, and further argues that the May 12, 2006, letter was not timely notice.

As the claimant has asserted a series of injuries, his last day of work would be the date of his injury, and as such March 27, 2006, would serve as the date of accident for this claim. Because of this, the claimant's letter of notice of May 12, 2006, would be well beyond the 10 day time period allowed by K.S.A. 44-520. Moreover, the claimant has no basis for a just cause argument to extend the notice period to 75 days as he was well aware of his injury, and the cause of it, at the time of his initial treatment with Dr. Hornbaker in September 2005.¹⁴

The parties are in agreement that the accident date is March 27, 2006, and that this is the date that should be utilized in determining whether claimant gave timely notice. The ALJ obviously was not relying on the May 12, 2006, letter to satisfy the notice requirement, as he found respondent had actual notice within 10 days. Just cause to extend the time for giving notice to 75 days was not mentioned. Nevertheless, it was apparent from their testimony that neither claimant nor his supervisor, Mr. McDaniel, were familiar with the concept of a repetitive trauma injury or how to handle a work-related injury caused by a series of micro-traumas. The ALJ obviously believed claimant's testimony that he had talked to his supervisors about his injuries and about those injuries being due to or aggravated by his job duties. Although his supervisors testified differently, Mr. McDaniel admitted that claimant told him that driving over the dock plates was causing him problems with his neck. This admission, standing alone, would satisfy the purpose for the statutory requirement to give notice. Accordingly, the undersigned Board Member finds that claimant gave timely notice of accident.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁶

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated September 13, 2006, is affirmed.

¹³ *Id.*

¹⁴ Appeal Brief of Respondent and Its Insurance Carrier at 7 (filed Oct. 30, 2006).

¹⁵ K.S.A. 44-534a.

¹⁶ K.S.A. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge